U.S. Department of Labor

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Issue Date: 04 May 2004

CASE NO.: 2002-LHC-2570
OWCP NO.: 01-155984

In the Matter of:

PAUL J. GARRY, JR.,
Claimant,

v.

ELECTRIC BOAT CORP.,
Self-Insured Employer.

Appearances: Scott Roberts, Esq.
For the Claimant

Mark Oberlatz, Esq.
For the Employer

Before: Stephen L. Purcell
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("Act" or "LHWCA"), 33 U.S.C. § 901 *et seq*. Claimant is seeking temporary total disability compensation under the Act for the period July 30, 2001 through November 7, 2001.

A formal hearing was held in this case on March 26, 2003 in Middletown, Connecticut at which both parties were afforded a full opportunity to present evidence and argument as provided by law and applicable regulation. Claimant offered exhibits 1 through 8 which were admitted into evidence.[1] Employer offered exhibits 1 through 9 which were admitted into evidence. ALJX 1 was marked for identification and admitted into evidence without objection. Both parties filed post-hearing briefs. Claimant submitted post-hearing deposition testimony of Steven B. Carlow, M.D. which is hereby admitted without objection as CX 9. Employer submitted the November 26, 2003 medical report and post-hearing deposition testimony of Philo F. Willetts, Jr., M.D. which are hereby admitted without objection as EX 10 and 11, respectively.

[1] The following abbreviations will be used as citations to the record: "CX" for Claimant's Exhibits, "EX" for Employer's Exhibits, "ALJX" for Administrative Law Judge Exhibits, and "Tr." for Transcript.

The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

The parties have stipulated (Tr. 6; Mar. 12, 2004 letter from Employer's counsel) and I find:

1. That Claimant and Employer were in an employee-employer relationship at all relevant times.
2. That Employer filed a timely first report of injury and notice of controversion.
3. That there has been no voluntary payment of compensation by Employer.
4. That Claimant has not yet reached maximum medical improvement ("MMI").
5. That Claimant's applicable average weekly wage was $860.63.

ISSUES

1. Whether Claimant sustained a compensable injury arising out of and during the course of his employment with Employer?
2. Whether Claimant filed a timely first report of injury under Section 12 of the LHWCA?
3. Whether Claimant filed a timely claim for disability compensation under Section 13 of the LHWCA?
4. Whether Claimant meets the status and situs requirements of Sections 2(3) and 3(a), respectively, of the LHWCA for coverage?
5. Whether Claimant was temporarily and totally disabled as a result of any such injury from July 30, 2001 through November 7, 2001?

FINDINGS OF FACT

Paul J. Garry, Jr.

Claimant was deposed on January 24, 2003 prior to the formal hearing in this case. CX - 8. He testified that he was born January 16, 1944, is widowed, graduated from high school in 1961, and attended Mitchell College for approximately six weeks but dropped out. *Id*. at 5. He began working for Electric Boat in 1962 and continued there until he retired in November 2001. *Id*. at 6. His first job was Structural Inspector working in the shipyard aboard the submarines inspecting welding and weld preparation. *Ibid.* In May 1964 he transferred into the Design Department working on the "613 project." *Ibid.* His work with Employer was continuous with the exception of when he was off on strike three times, the most recent of which was for approximately a year and a half in 1983-1984. *Id*. at 7.

Mark Butterfield was Claimant's last supervisor at Electric Boat before he retired. *Id*. at 8. He started working for him around the spring of 2000, and was working on Virginia Class

submarines. *Ibid.* Claimant worked for Eric Jay on the Virginia Class project from around 1993 to 2000. *Id*. at 9. He testified:

> I had to – as part of working on that project, we had to go to – because the ship was not in the shipyard yet. We were working on the new design of the boat, so we would have to go occasionally to Quonset Point and, you know, look at different hull sections and things like that.

Ibid. Claimant worked on structural design prior to working on the Virginia Class project in 1990, and was involved in a variety of projects including the Trident project, the "688 project," and overhauls. *Id*. at 10. While working on the 688 project, he had to go aboard the submarines two or three times a week. *Ibid.* The amount of time he spent on the boat varied from 15 minutes to four hours at a time, depending on the problem he was attempting to resolve, and probably averaged about ten hours a week. *Id*. at 11.

In October 1968, Claimant sustained an injury to his right knee while in San Diego, California after Electric Boat assigned him and other structural design people to assist on a DC-10 aircraft project at the Convair facility at Lindberg Airfield. *Id*. at 11-12. The airfield was not near the ocean, any port facilities, or any river or canal used by oceangoing vessels in San Diego. *Id*. at 12-13. Claimant had checked into a hotel after arriving in San Diego and, after he and the others unpacked, he went out to relax near the swimming pool. *Id*. at 13. He slipped by the side of the pool and tore the medial collateral ligament in his right knee. *Ibid.* He reported the injury and saw a physician while in San Diego but could not recall the physician's name. *Ibid.* The accident occurred on a Friday, he saw the physician on Saturday, and the doctor performed surgery on the knee on Sunday. *Id*. at 14. He had follow-up visits with the doctor in San Diego, but could not recall if he had follow-up treatment after returning to Connecticut. *Ibid.* He did not file a worker's compensation claim against Electric Boat for the injury. *Ibid*. Claimant testified that Electric Boat's insurance paid for his treatment, including the costs of his operation and hospitalization as well as weekly disability payments. *Id*. at 15.

Claimant did not recall suffering any other injuries to his right knee while working at Electric Boat other than general "aches and pains" which he experienced when "crawling around [submarines in] very small spaces, behind cabinets and in between hull frames." *Ibid*. He began to seek treatment from Dr. Carlow in the mid 1980's for his knees. *Id*. at 16. Dr. Carlow treated Claimant with cortisone shots and ultimately performed total knee replacements in August of 2001. *Ibid.* He also performed arthroscopic surgery on his right knee in 1995. *Id*. at 17. Dr. Carlow released Claimant to return to work in November 2001, but he began experiencing other physical problems involving his neck and shoulder and only worked for a couple of days. *Id*. at 18-29. He underwent surgery on his neck in the beginning of 2002 and returned to work for four hours per day for two weeks beginning July 18, 2002. *Id*. at 19. Dr. Carlow never told Claimant that his right knee replacement surgery was due to his employment at Electric Boat. *Id*. at 21. He explained that the right knee injury in 1968 resulted in the development of arthritis which caused the knee to deteriorate over time. *Ibid*.

On examination by his attorney, Claimant testified his last day of work was around November 13 or 17, 2001. *Id*. at 22. While working on the Virginia Class project from 1990 to

1997, he traveled to Quonset Point, Rhode Island to inspect submarine hull sections. *Ibid.* While working with the liaison group after 1966, he worked in the shipyard itself and would be on and off the boats every day doing "troubleshooting," spending approximately 20 to 30 hours a week onboard the ships themselves. *Id*. at 23.

Claimant further testified that his right knee always bothered him after his 1968 surgery and gradually got worse over time. *Id*. at 26. Dr. Carlow told him that cortisone shots and arthroscopic surgery would help, but that a total knee replacement would be necessary when Claimant could no longer withstand the pain. *Ibid*. Claimant attributed his need for the knee replacement to his work at Electric Boat, testifying:

> I mean, that's really the only physical thing that I did that could affect my knees. Just walking up and down the hill at Electric Boat to get down to the shipyard and back up to the hill is a – it's a heck of a walk. And that in itself – you know, there's days you come out of that place limping because you have to spend three or four hours on the boat and going back and forth to the hill. And maybe you had to do that a couple times a day. And to me it was the only thing that caused the aggravation, because I really wasn't doing any other physical thing.

Id. at 28.

Claimant reiterated at the formal hearing that he first started working for Employer in 1962 in the shipyard, and then moved to the Design Department at Electric Boat in 1964 where he was working on the "613 project . . . working in structural design which does the hull, decks, foundations and things like that." Tr. 21. His job "required spending a lot of time in the shipyard specifically resolving [design problems brought to his attention by trades people working on the boats]." *Ibid*. From approximately 1964 to 1967, he was involved in the design of the 613, 614, and 615 submarines (part of the Thresher Class boats), and went into the shipyards and boarded submarines "at least three or four days a week . . . trying to solve those problems." Tr. 22.

According to Claimant, assembly of the submarines he was working on began at Electric Boat's Quonset Point facility, and the boats were approximately 75 percent complete by the time they get to the Groton, Connecticut facility. *Id*. at 26. He testified:

> At Quonset they had whole sections standing on end basically, and they would end load these sections. So you would have to climb up ladders and into a hull section, but it was basically a section of hull completed with all the equipment inside it.

Ibid. He went to Quonset Point "probably once a week." *Id*. at 26-27.

During the course of his employment with Electric Boat, Claimant was involved in 8 to 10 "ship checks" as part of his duties. Tr. 27-29. He and others would travel to a remote site where they would spend approximately two weeks, approximately 10 hours a day, checking submarines to ensure that when the boats came in for overhaul, the plans would be ready and

work could commence upon their arrival at the shipyard. *Ibid.* The work was "physically demanding" and the last time he performed such a task was around 1977 or 1978. *Ibid*.

Claimant described the office in which he worked in the Design Department as being on the top of a "very steep hill" which was approximately one-half mile from the shipyard at Electric Boat. *Id*. at 31. It was across the street from the shipyard and connected by a tunnel that went under the street. *Id*. at 32. Claimant could either walk across the street and enter the shipyard or walk through the tunnel. *Ibid*.

When he began working on the Virginia Class project in 1990 or 1991, he began working on computers. *Ibid*. He testified:

> We were working on a new concept of a way to design a ship electronically, and ways to get the Navy more involved, and get the customers more involved. So it was an entirely new way of doing business, and that was pretty much – I never thought I could do it, but I got used to working with computers somehow. But that was pretty much what it was for the last years of my employment.

Id. at 33. He testified that he would "occasionally go down in the yard because they grandfather a lot of things from one submarine to another." *Ibid*. He also continued to go to Quonset Point about once a week to physically look at hull sections of the boats he was designing. *Id*. at 34.

Claimant again testified that he went back to work after his bilateral total knee replacements in August 2001, but he left work in November 2001 because of a variety of physical problems. *Id*. at 37. He began receiving Social Security disability benefits in July 2002. *Ibid*.

Before he had his total knee replacements, Claimant walked to work. *Id*. at 39. It was about a half mile from his residence to the shipyard. *Ibid*. He began walking to work when he moved into the apartment on Bishop Court around 1996 or 1997. *Id*. at 40-41. He worked in Building 221, which was across Eastern Point Road from the shipyard gate during the entire time he worked on the Virginia Class project. *Id*. at 41-42. He only went to the shipyard two or three times during the two-year period Mark Butterfield was his supervisor. *Id*. at 42. In the six years he was working for Eric Jay, he may have gone into the shipyard 20 to 30 times. *Id*. at 44. He did not go to Quonset Point at all when working for Butterfield, and made about 40 trips there while working for Jay. *Ibid.* Claimant does not recall ever reporting a right knee injury to the Yard Hospital at the Groton facility while he was employed by Electric Boat other than the injury he sustained in 1968 in San Diego. *Id*. at 47.

Steven B. Carlow, M.D.

Dr. Carlow, who is a board certified orthopedist, was deposed on June 17, 2003 by Claimant's attorney in Groton, Connecticut. CX 9 1-3. He first began treating Claimant on August 6, 1991 when he was referred by Dr. McDermott, a family physician, because of significant pain in his left knee and ankle. *Id*. at 4. X-rays taken at that time disclosed arthritis in the left knee and ankle, and instability in the ankle. *Ibid.* The medical history taken at that

time also noted arthritis in the right knee subsequent to a 1968 operation following a fall. *Ibid.* Surgical intervention with respect to the left knee was discussed and anti-inflammatory medication and exercise were prescribed. *Id*. at 4-5. Claimant reported no trauma to the left knee but indicated that it had "been clicking, catching, giving him some discomfort, swelling just with daily activities [over the last several months]." *Id*. at 5.

The next time Dr. Carlow saw Claimant after August 1991 was March 24, 1993 when he came in with complaints of left elbow pain. *Id*. at 5-6. Claimant also mentioned increasing aching and pain along the lateral aspect of his right knee. *Id*. at 6. X-rays taken then showed cartilage damage and a significant amount of arthritis in the right knee. *Ibid*. Dr. Carlow did not recall asking him at that time what the physical requirements of his job were. *Id*. at 7.

An October 21, 1997 treatment note reflects that Claimant came in with complaints of symptoms in his right knee and left shoulder after doing a significant amount of work around the house involving lifting, walking, and climbing. *Ibid*., CX 2 at 10. According to Dr. Carlow:

> Well, with the amount of wear and tear he had or arthritis changes in the knee, anything that puts stress on the knee will aggravate his condition, especially squatting, kneeling, stairs, climbing. Obviously running and jumping also but anything – those specific types of activities would be the most irritating or the most aggravating to the knee in general.

Id. at 7-8.

Dr. Carlow testified that he did not have a copy of an Electric Boat Yard Hospital visit report dated September 8, 1995 showing that he had imposed a restriction on Claimant of no climbing noted as a non-industrial condition. *Id*. at 8. He had no specific recollection of any contact by the Yard Hospital but testified that they might have called his office to determine what if any restrictions had been imposed on Claimant. *Ibid*.

Dr. Carlow performed a right total knee replacement on Claimant on July 30, 2001. *Id*. at 8-9. He testified that at that time cartilage osteophytes in the notch patella showed significant arthritic changes and there had been complete loss of joint space in the knee. *Id*. at 9. Dr. Carlow further testified he had previously operated on Claimant's right knee in August 1995. *Ibid*., CX 2 at 11-12. According to Dr. Carlow, activities such as climbing ladders and squatting "would most likely accelerate [and aggravate] the arthritic changes in general." CX 9 at 10.

On cross-examination, Dr. Carlow acknowledged that his treatment records reflect that he treated Claimant also for gout. *Id*. at 11. He described gout as a condition resulting from a build up of uric acid in the blood which can affect numerous organs, cause kidney stones, and can also cause arthritic changes in the joints. *Ibid*. He agreed that a history of gout could be an important factor with respect to severe arthritis in the knees. *Ibid*. Claimant had severe arthritis in both knees, and Dr. Carlow was considering surgery on the left knee rather than the right knee when he saw Claimant in August 1991. *Id*. at 12.

When he performed arthroscopy on Claimant's right knee on August 11, 1995, Dr. Carlow found severe arthritis of the medial compartment, some arthritis of the patella, a lateral meniscal tear, and inflammation of the knee. *Id*. at 12-13. The medial joint revealed changes post subtotal medial meniscectomy from the prior 1968 surgery. *Id*. at 13. Dr. Carlow had no recollection of telling Claimant before the date of the deposition that his employment could have contributed to or aggravated his arthritic knee condition. *Id*. at 13-14. He could also not remember Claimant ever telling him anything about how much climbing, squatting, or kneeling he did in connection with his work at Electric Boat. *Id*. at 14. He agreed that the treatment note from October 21, 1997 related to complaints of shoulder and knee pain reflected statements by Claimant that he had been doing a significant amount of work around the house involving lifting, walking, and climbing stairs. *Id*. at 15. He also noted that his records showed that Claimant had been seen for arthritis in the cervical spine, left shoulder pain, and left knee and ankle pain. *Id*. at 15-16.

Claimant was also seen in March 2001 with complaints of bilateral ankle pain as well as increased aching and pain in his right knee. *Id*. at 16-17, CX 2 at 9. A treatment note dated March 21, 2001 reflects the following:

> The patient states over the last month or so, he has had persistent aching and pain both in his knees and ankles. He was seen recently by Dr. Bertman who has evaluated him and apparently scheduled him for serum uric acid. He had blood work in October which he states other than slight increased glucose, for which he was evaluated by Dr. McDermott and at the diabetes clinic, everything was within normal limits. He is presently on hypertensive medications . . . which has not significantly helped his pain. The patient is here now for evaluation of both his knees and ankles.

CX 2 at 9. X-rays taken at the time showed significant arthritic changes on the right with involvement of all three compartments, with significant osteophytes, spurring, and complete loss of the joint spaces. *Ibid*.

Claimant was seen May 31, 2001 for follow up evaluation of the severe degenerative joint disease of his bilateral knees. CX 2 at 7. A treatment note dated that day reflects significant disability and pain in both knees with activities of daily living and at rest. *Ibid*. He met again with Dr. Carlow on July 24, 2001 in preparation for his total knee arthroplasty on the right. CX 2 at 6. That procedure was performed on July 30, 2001 by Dr. Carlow and Claimant was discharged on August 4, 2001. CX 6. When Claimant was seen August 22, 2001 for follow up, he informed Dr. Carlow that he was doing "extremely well with physical therapy, range of motion and ambulation with partial weight bearing with crutches." CX 2 at 5. When he was again seen on September 7, 2001 following his left knee total arthroplasty, Claimant informed Dr. Carlow that he had "absolutely no symptoms with respect to the right knee." CX 2 at 4. Follow up reports dated September 26, 2001, October 26, 2001, and January 2, 2002 similarly reported excellent progress. CX 2 at 1-3.

Philo F. Willetts, Jr., M.D.

On November 26, 2003, Dr. Willetts examined Claimant in his Westerly, Rhode Island office with respect to complaints of right and left knee pain and occasional weakness following his total knee replacements two years earlier. EX 10. Dr. Willetts report notes that Claimant said his right knee had bothered him since a fall in 1968 and his left knee had bothered him since the early 1970's. *Id*. at 1. Claimant reported that, when he returned to Connecticut from San Diego in March 1969, he saw an orthopedic surgeon, whose name he could not remember, for a few months for treatment of his right knee, and said his right knee occasionally hurt and locked up thereafter. *Id*. at 2. In the early 1970's, both knees began to bother him, with no new injury, and he began seeing Dr. Carlow in the mid 1980's after the pain gradually increased. *Ibid*. Both knees gradually worsened, and he underwent total knee replacements in August and September 2001. *Ibid*. Claimant reported pre-operative pain levels in his knees as 10 and pain ranging from 0 to 4 thereafter. *Id*. at 3.

Based on his physical examination of Claimant, as well as a review of various medical records and x-rays, Dr. Willetts rendered the following diagnoses:

> 1. Status post reported slip and fall 1968, with torn medial collateral ligament right knee – promptly repaired.
> 2. Subsequent degenerative arthritis right knee and torn right lateral meniscus – status post arthroscopic debridement and partial meniscal resection, 1995.
> 3. Chronic obesity.
> 4. Osteoarthritis left knee.
> 5. Status post bilateral total knee arthroplasties August, 2001, with good results.
> 6. Significant neuropathy – exact cause unclear, requiring further definitive evaluation

Id. at 12-13. Dr. Willetts concluded with respect to Claimant's knees that no further treatment was necessary, treatment previously provided had been reasonable and necessary, Claimant had reached maximum medical improvement, and he could return to the full duties of a designer with the exception that he should not go aboard submarines with respect to his knee condition. *Id*. at 13-14. Dr. Willetts also found Claimant to be partially disabled because of his knee condition, and stated;

> He had an injury to the right knee in 1968 which began the contribution towards his right knee arthritis. He had preexisting osteoarthritis of the left knee. He has a significant neurological pathological condition. Thus, his knee conditions are not the sole cause of his disability.

Id. at 14-15. With respect to whether Claimant had "any previous condition or injury which would combine with this injury to make his present injury materially and substantially greater," Dr. Willetts wrote:

> Yes. He had had a previous right knee injury in 1968. He has had chronic obesity. He has had an unrelated neurological abnormality already present as of

> preoperatively, in August 2001, and which apparently has progressed and worsened.

Id. at 15.

Dr. Willetts was deposed by Employer's counsel on February 3, 2004 in Westerly, Rhode Island, and much of his testimony simply repeats the information contained in his report of examination dated November 26, 2003. EX 11. It was Dr. Willetts' opinion that Claimant's osteoarthritis of the left knee was unrelated to his employment with Electric Boat. *Id*. at 13. He further opined that Claimant's right knee condition was the result of his 1968 injury in San Diego. *Id*. at 14. When asked if Claimant's right total knee replacement was a natural progression of the 1968 injury, he testified:

> Yes. He probably has had a component of bilateral osteoarthritis and he has had gout that has apparently affected both knees as well as his feet, but the 1968 work injury very probably did naturally progress to that point of there being significant arthritis.

Ibid. Dr. Willetts further testified:

> There is nothing in the records or the history or the examination to suggest that his subsequent employment was responsible or contributed to or aggravated or accelerated his right knee arthritis that led to his total knee replacement.

Id. at 15. He reiterated his opinion that Claimant was capable of performing his past relevant work at Electric Boat so long as he did not go onto submarines in light of his knee conditions. *Ibid*. He stated that Claimant had reached MMI and had a 37 percent permanent partial physical impairment of the right lower extremity based on Table 1733 of the AMA Guides, 5th Edition. *Id*. at 16. Dr. Willetts did not review the transcript of Dr. Carlow's deposition, and stated that, in his experience, there was nothing unusual or peculiar about the work at Electric Boat that would predispose someone to knee injuries absent the kind of trauma reported by Claimant from his 1968 injury in San Diego. *Id*. at 18-19. He therefore disagreed with Dr. Carlow's opinion that Claimant's work activities contributed to his total knee replacement. *Id*. at 19.

DISCUSSION

A. Injury Arising Out of and in the Course of Employment.

Claimant is seeking temporary total disability compensation from July 30, 2001 through November 7, 2001 and medical benefits solely with respect to his right total knee replacement. Tr. 12-13, Claimant's Brief ("Cl. Br.") at 6. He has characterized the "primary issue" in this case as whether "Claimant's continued employment for Electric Boat Corporation subsequent to the right knee injury in San Diego, California [in] 1968, contributed to or is somehow causally-connected to the total knee replacement to the right lower extremity of August 2001." Cl. Br. at 5-6.

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. *See* 33 U.S.C. § 902(2); *U.S. Indus./Fed. Sheet Metal, Inc.*, 455 U.S. 608, 615, 14 BRBS at 631 (1982). The Board and Courts have described the meaning of "injury" in fairly broad terms. The Board has held that "if something unexpectedly goes wrong within the human frame, even if this occurs in the course of usual and ordinary work, claimant has sustained an accidental injury under the Act." *McGuigan v. Washington Metro. Area Transit Auth.*, 10 BRBS 261, 263 (1979); *see also Wheatley v. Adler*, 407 F.2d 307, 311 n. 6 (D.C. Cir. 1968). In other words, the LHWCA does not require a showing of unusual stress or exposure to anything more than the ordinary hazards of living and working. *Wheatley*, 407 F.2d at 311.

The LHWCA provides a presumption that a claim comes within its provisions. *See* 33 U.S.C. §920(a). To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) he sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). The claimant is not required to introduce affirmative medical evidence that the working conditions in fact caused the alleged harm; rather, the claimant must show that working conditions existed which could have caused the harm. *See generally U.S. Indus.*, 455 U.S. at 615. A claimant's credible subjective complaints of pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption. *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Dir., OWCP*, 681 F.2d 359 (5th Cir. 1982).

Other than the October 1968 injury in San Diego when he fell and tore the medial collateral ligament in his right knee, Claimant did not recall suffering any injuries to his right knee other than general "aches and pains" which he experienced while working for Electric Boat when "crawling around [submarines in] very small spaces, behind cabinets and in between hull frames." CX 8 at 15. Claimant recalled seeking treatment from Dr. Carlow in the mid 1980's for his knees. *Id*. at 16. Dr. Carlow treated Claimant with cortisone shots and ultimately performed total knee replacements on both knees in August of 2001. *Ibid*. Claimant attributed his need for the knee replacement to his work at Electric Boat, testifying:

> I mean, that's really the only physical thing that I did that could affect my knees. Just walking up and down the hill at Electric Boat to get down to the shipyard and back up to the hill is a – it's a heck of a walk. And that in itself – you know, there's days you come out of that place limping because you have to spend three or four hours on the boat and going back and forth to the hill. And maybe you had to do that a couple times a day. And to me it was the only thing that caused the aggravation, because I really wasn't doing any other physical thing.

CX 8 at 28.

Dr. Carlow's records reflect that he began treating Claimant on August 6, 1991 when he was referred by Dr. McDermott, a family physician. CX 9 at 4. The medical history taken by Dr. Carlow at that time noted arthritis in the right knee subsequent to a 1968 operation following a fall. *Ibid.* He saw Claimant on March 24, 1993 when he came in with complaints of, *inter alia*, increasing aching and pain along the lateral aspect of his right knee. *Id*. at 6. X-rays taken then showed cartilage damage and a significant amount of arthritis in the right knee. *Ibid*. Dr. Carlow performed arthroscopic surgery on Claimant's right knee in August 1995. CX 9 at 9; CX 2 at 11-12. An October 21, 1997 treatment note reflects that Claimant was again treated by Dr. Carlow for complaints of symptoms in his right knee after working around the house. CX 2 at 10. Claimant had a total knee arthroplasty on the right on July 30, 2001 and was discharged on August 4, 2001. CX 6. According to Dr. Carlow, activities such as climbing ladders and squatting "would most likely accelerate [and aggravate] the arthritic changes in general." CX 9 at 10.

The testimony of Claimant and Dr. Carlow establish that Claimant sustained physical harm or pain and that conditions existed at his workplace which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, *supra.*, 16 BRBS 128; *U.S. Indus./Fed. Sheet Metal, Inc.*, *supra*, 14 BRBS at 631. He has thus established a *prima facie* case necessary for the invocation of the Section 20(a) presumption. *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Dir., OWCP*, 681 F.2d 359 (5th Cir. 1982).

Once a claimant establishes a *prima facie* case, the employer must present substantial evidence proving the absence of or severing the connection between such harm and employment in order to rebut the presumption. *Parsons Corp. of California v. Dir., OWCP*, 619 F.2d 38 (9th Cir. 1980); *Butler v. Dist. Parking Mgmt. Co.*, 363 F.2d 682 (D.C. Cir. 1966); *Ranks v. Bath Iron Works Corp.*, 22 BRBS 301, 305 (1989). Substantial evidence is the kind of evidence a reasonable mind might accept as adequate to support a conclusion. *See, e.g., Travelers Ins. Co. v. Belair*, 412 F.2d 297 (1st Cir. 1969).

In support of its assertion that Claimant did not sustain an injury to his right knee or aggravation of the arthritis in his right knee, Employer argues that "the medical opinion of Dr. Willetts is sufficient to rebut the [Section 20(a)] presumption." Emp. Br. at 5. Based on his physical examination of Claimant, as well as a review of various medical records and x-rays, Dr. Willetts diagnosed Claimant with, *inter alia*:

> 1. Status post reported slip and fall 1968, with torn medial collateral ligament right knee – promptly repaired.
> 2. Subsequent degenerative arthritis right knee and torn right lateral meniscus – status post arthroscopic debridement and partial meniscal resection, 1995.

EX 10 at 12-13. Dr. Willetts concluded with respect to Claimant's knees that no further treatment was necessary, treatment previously provided had been reasonable and necessary, Claimant had reached maximum medical improvement, and he could return to the full duties of a designer with the exception that he should not go aboard submarines with respect to his knee condition. *Id*. at 13-14. He found Claimant to be partially disabled because of his knee condition, and stated;

> He had an injury to the right knee in 1968 which began the contribution towards his right knee arthritis. He had preexisting osteoarthritis of the left knee. He has a significant neurological pathological condition. Thus, his knee conditions are not the sole cause of his disability.

Id. at 14-15. Dr. Willetts opined that Claimant's right knee condition was the result of his 1968 injury in San Diego and that Claimant "had gout that has apparently affected both knees as well as his feet . . . ." EX 11 at 14. He testified that Claimant's right total knee replacement was "very probably" a natural progression of the 1968 injury, and that "[t]here is nothing in the records or the history or the examination to suggest that his subsequent employment was responsible or contributed to or aggravated or accelerated his right knee arthritis that led to his total knee replacement." *Id*. at 14-15. Dr. Willetts did not review the transcript of Dr. Carlow's deposition, and stated that, in his experience, there was nothing unusual or peculiar about the work at Electric Boat that would predispose someone to knee injuries absent the kind of trauma reported by Claimant from his 1968 injury in San Diego. *Id*. at 18-19. He therefore disagreed with Dr. Carlow's opinion that Claimant's work activities contributed to his total knee replacement. *Id*. at 19.

I find Dr. Willetts' opinion that Claimant's right knee arthritis was a result of his 1968 injury and gout constitutes substantial evidence rebutting the Section 20(a) presumption that Claimant's condition was caused or aggravated by his employment at Electric Boat, in large part because that opinion is substantially consistent with the treatment records and testimony of Dr. Carlow, Claimant's treating physician. For example, when Dr. Carlow performed arthroscopy on Claimant's right knee on August 11, 1995, he found evidence of the 1998 surgical procedure on the medial meniscus, severe arthritis of the medial compartment, some arthritis of the patella, a lateral meniscal tear, and inflammation of the knee. CX 9 at 12-13. Medical records of Dr. Carlow thereafter consistently note that Claimant's degenerative condition is substantially greater in the right knee than the left knee. *See*, *e.g.*, CX 2 at 9-10, CX 3 at 2, CX 4, CX 5 at 1, 3. According to Claimant, Dr. Carlow told him that the right knee injury in 1968 resulted in the development of arthritis which caused the knee to deteriorate over time. CX 8 at 21. Furthermore, Dr. Carlow testified that he treated Claimant for gout, which he described as a condition resulting from a build up of uric acid in the blood, that gout can cause arthritic changes in the joints, and that a history of gout could be an important factor with respect to severe arthritis in Claimant's knees. CX 9 at 11. Although the report of Dr. Carlow's 1991 initial evaluation of Claimant is not included in the instant record, that report was among the medical records reviewed by Dr. Willett, and, according to Dr. Willett, it showed that Claimant's complaints of severe joint aching and pain were described by Dr. Carlow as "probably related to gouty arthritis." EX 10 at 8.

Based on the foregoing, I find that Dr. Willett's opinion is evidence which a reasonable mind might accept as adequate to support the conclusion that Claimant's right knee condition was neither caused nor aggravated by his employment at Electric Boat. *Travelers Ins. Co. v. Belair*, *supra*., *412* F.2d 297. It is well reasoned, is consistent with the record, and is substantial countervailing evidence severing the connection between Claimant's right knee condition and his employment or working conditions. *Parsons Corp. v. Director, OWCP (Gunter)*, 619 F.2d 38,

12 BRBS 234 (9th Cir. 1980), *aff'g* 6 BRBS 607 (1977); *Butler v. District Parking Management Co.*, 363 F.2d 682 (D.C. Cir. 1966); *Hampton*, 24 BRBS at 144; *Ranks v. Bath Iron Works Corp.*, 22 BRBS 302, 305 (1989); *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989); *Sam v. Lofeland Bros. Co.*, 19 BRBS 228, 231 (1987); *Kier*, 16 BRBS at 129. I therefore find that his opinion is sufficient to rebut the Section 20(a) presumption.

Once the Section 20(a) presumption is rebutted, it falls out of the case and the judge must then weigh all the evidence and resolve the case based on the record as a whole. *MacDonald v. Trailer Marine Transport Corp.*, 18 BRBS 259 (1986), *aff'd mem. sub nom. Trailer Marine Transport Corp. v. Benefits Review Board*, 819 F.2d 1148 (11th Cir. 1987); *Hislop v. Marine Terminals Corp*., 14 BRBS 927 (1982). The burden of persuasion continues to rest on the claimant under section 7(c) of the Administrative Procedure Act. *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816, 33 BRBS 71(CRT) (7th Cir. 1999)(*en banc*), *cert. denied*, 120 S. Ct. 1239 (2000) citing *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267 (1994).

Claimant argues that his right knee condition was made substantially worse by the "crawling around [he did in submarines in] very small spaces, behind cabinets and in between hull frames," as well as having to walk approximately one-half mile on a daily basis between his office, located on a "very steep hill," and the shipyard below. CX 8 at 15, 28, Tr. at 31. Claimant testified that his right knee always bothered him after his 1968 surgery and that it gradually got worse over time. *Id*. at 26. Claimant is clearly competent to describe his physical activities and how those activities affected him, and I find his testimony credible with respect to his job duties and the complaints of right knee pain he experienced between the time of his 1968 injury and his 2001 total right knee replacement. However, in light of the fact that he has not been shown to have any medical training which might qualify him to render an opinion regarding whether his right knee condition was aggravated by the duties of his job, that opinion is given little weight with respect to the issue of causation.

The opinions of Drs. Carlow and Willetts, as described above, are at odds with respect to whether Claimant's post-operative right knee condition was aggravated by his employment at Electric Boat. Dr. Carlow is a board-certified orthopedist and has treated Claimant since the early 1990s for, among other conditions, his right knee arthritis. CX 9 at 3-4. It was Dr. Carlow's opinion that activities such as climbing and squatting "would most likely [aggravate and] accelerate the arthritic [condition in Claimant's knee]." CX 9 at 10. However, aside from the fact that his opinion is rather equivocal, Dr. Carlow made no attempt whatsoever to relate any deterioration in Claimant's right knee condition to his specific work activities. I also find it particularly significant that there is nothing in Dr. Carlow's treatment records over the ten plus years that he saw Claimant which relate Claimant's right knee condition to any activities at work. On the contrary, in several instances, records of treatment reflect complaints of right knee pain expressly associated with non-work-related activities. *See, e.g.*, EX 10 at 8 (1991 report of examination noted "multiple medical problems and . . . complaint of severe joint aching and pains, said to be probably related to gouty arthritis"); EX 10 at 9 (July 27, 1994 note showing "complaints of persistent right knee pain, increased since the previous week when he was said to have twisted the knee"); *Ibid*. (August 24, 1994 note that "Mr. Garry was holding off on [arthroscopy of right knee] as he was doing a significant amount of moving at home, redoing the

house."); EX 10 a 9 (July 17, 1995 note showing "persistent complaints of right knee aching and pain, with acute episode of swelling the day before when getting out of his golf cart and twisting the knee"); CX 2 at 11 (August 8, 1995 treatment note to discuss right knee arthroscopic surgery); Plaintiff's Ex. 1 to CX 9 (September 8, 1995 hospital visit report noting non-industrial accident and Claimant out of work August 10, 1995 to September 5, 1995); CX 2 at 10 (October 21, 1997 follow-up for degenerative joint disease of right knee noting Claimant "was said to be doing a significant amount of work around his house with lifting, walking, climbing, and stairs.").

Dr. Willetts is a board-certified orthopedic surgeon, he examined Claimant on November 26, 2003, and reviewed all available relevant medical records generated by Dr. Carlow and others dated between 1991 and 2002. EX 10, EX 11 at 6. It was Dr. Willetts' opinion that Claimant's right knee condition resulted from his original 1968 injury, that it was accelerated by his gout, and that his total right knee replacement was a natural progression of his work-related injury in 1968. EX 11 at 14. Dr. Willetts testified that it was his opinion, within a reasonable degree of medical probability that:

> [t]here is nothing in the records or the history or the examination to suggest that [Claimant's] subsequent employment was responsible or contributed to or aggravated or accelerated his right knee arthritis that led to his total knee replacement.

Id. at 15. Dr. Willetts expressly rejected Dr. Carlow's opinion that Claimant's work aboard submarines at Electric Boat's shipyard probably caused or contributed to Claimant's right knee condition. *Id*. at 18-19.

Based on the foregoing evidence, I find that Claimant has failed to carry his burden of showing that his right knee condition, including his 2001 right knee arthroplasty, was either caused or aggravated by his work at Electric Boat. *American Grain Trimmers, Inc. v. Director, OWCP*, *supra*, *181* F.3d 816; *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267. Nothing in Dr. Carlow's treatment records relates his knee condition in any way to his work activities. Indeed, it was simply Dr. Carlow's opinion, expressed for the first time at his post-hearing deposition in this case, that "anything that puts stress on the knee will aggravate his condition, especially squatting, kneeling, stairs, climbing." *Id*. at 7. During the more than ten years he treated Claimant, he never informed him that his employment could have caused or aggravated his arthritic knee condition. CX 9 at 13-14. Nor was he ever asked to compare or contrast Claimant's non-working activities of daily living with his work-related activities or to opine on whether there was anything specific about Claimant's duties at work which accelerated the need for his knee surgery beyond the normal wear and tear that occurred as a result of his other activities, such as working around the house or playing golf. Dr. Carlow's opinion is not well reasoned nor is it supported by the medical records of evidence, many of which are Dr. Carlow's own treatment records. I find that his opinion is outweighed by the better reasoned opinion of Dr. Willetts, and I therefore find that Claimant did not sustain a work-related injury to his right knee while employed by Electric Boat.

B. Timely First Report of Injury and Claim for Disability Compensation.

Even if Claimant were able to prove that he sustained a work-related injury under the Act, which he has not, his claim must be denied for other reasons. As Claimant correctly asserts, the Benefits Review Board ("Board") has held that an injury may occur over a gradual period of employment and still be construed as an accidental injury under the LHWCA. Cl. Br. at 17, *citing Pittman v. Jeffboat, Inc.*, 18 BRBS 212 (1986). He thus argues that he is entitled to compensation since he engaged in "systematic, ongoing and regular work in the shipyard including . . . work aboard the submarines . . . [involving] squatting, crawling, climbing, etc. . . . [which Dr. Carlow opined] aggravated the underlying osteoarthritis in the Claimant's right knee." Cl. Br. at 18. The evidence establishes, however, that Claimant believed long before he filed his claim that his right knee condition was aggravated by his activities at work. The evidence further demonstrates that he failed to give timely notice of his injury, or to file a claim for compensation, within the periods prescribed by the Act. 33 U.S.C. §§ 912, 913. His claim for compensation must therefore be denied for this reason as well.

Section 12 of the LHWCA states, in pertinent part:

> (a) Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment, except that in the case of an occupational disease which does not immediately result in a disability or death, such notice shall be given within one year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. Notice shall be given (1) to the deputy commissioner in the compensation district in which the injury or death occurred, and (2) to the employer.

33 U.S.C. § 12(a). Thus, Claimant was obligated to give Electric Boat notice of his right knee injury within thirty days from the date he became "aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment . . . ." *Ibid*.[2]

[2] Claimant's degenerative right knee condition has been attributed at least in part to his 1968 traumatic injury by both Dr. Carlow and Dr. Willetts. Counsel for Claimant argues further that the need for Claimant's right knee arthroplasty is attributable to "repetitive trauma" associated with, *inter alia*, the kneeling, crawling, climbing, and walking in which he engaged while working for Employer. Claimant's claim is thus properly construed as one seeking compensation for disability resulting from an accidental injury rather than an occupational disease. *See, e.g., Gencarelle v. Gen. Dynamics Corp.* 892 F.2d 173 (2nd Cir. 1989) (synovitis of knee alleged by claimant to be result of repetitive trauma associated with bending, stooping, and climbing, not occupational disease under LHWCA). The thirty day limitations period for reporting an injury is thus applicable. However, even if Claimant's degenerative arthritis of the knee could be considered an occupational disease under the Act, and he thus had one year under Section 12 to give notice of the injury, and two years under Section 13 to file a claim, I would still find his notice of injury and claim untimely because neither event occurred within the extended limitations periods provided for occupational diseases under the Act.

Section 13 of the Act similarly provides in pertinent part:

> (a) Except as otherwise provided in this section, the right to compensation for disability or death under this Act shall be barred unless a claim thereof is filed within one year after the injury or death. . . . The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

33 U.S.C. § 13(a).[3] Thus, Claimant was obligated to file a claim for compensation within one year from the date upon which he became aware of, or reasonable should have known, his right knee disability was related to his employment.[4]

According to Claimant, Employer has raised Sections 12 and 13 of the LHWCA as defenses without reason or explanation. Cl. Br. at 20, 22. He asserts that his claim for compensation is presumed to be timely under Section 20(b) of the Act absent substantial evidence to the contrary. He further argues "that the Employer not only has failed to present substantial evidence that the Claimant has not given sufficient notice pursuant to Section 12 [and presumably has also failed to present substantial evidence to rebut the presumption with respect to Section 13 as well] but it is respectfully maintained that Respondent has failed to submit any evidence [on these issues] whatsoever." *Id*. at 20-21.

Section 20(b) of the LHWCA provides a presumption that "sufficient notice of [a claim for compensation under the Act] has been given." 33 U.S.C. § 920(b). The Board has expressly held that this presumption applies to Section 13 of the Act. *See Jackson v. Ingalls Shipbuilding Div., Litton Sys.*, 15 BRBS 299 (1983); *Carlow v. General Dynamics Corp.*, 15 BRBS 115 (1982), *overruling Kirkland v. Air America, Inc.*, 13 BRBS 1108 (1981); *Mattox v. Sun Shipbuilding & Dry Dock Co.*, 15 BRBS 162 (1982). Several circuit courts of appeals have also held Section 20(b) applicable to Section 12 of the Act. *See, e.g.*, *Stevenson v. Linens of the Week*, 688 F.2d 93 (D.C. Cir. 1982), *rev'g* 14 BRBS 304 (1981); *United Brands Co. v. Melson*, 594 F.2d 1068, 1072, 10 BRBS 494 (5th Cir. 1979), *aff'g* 6 BRBS 503 (1977). *See also Januszewicz v. Sun Shipbuilding & Dry Dock Co.*, 677 F.2d 286, 14 BRBS 705 (3d Cir. 1982), *rev'g* 13 BRBS 1052 (1981) (court, assuming without deciding that Section 20(b) presumption applicable

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[3] The Act also provides that "failure to file a claim within the period prescribed in such subdivision shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard." 33 U.S.C. § 913(b)(1). Employer expressly listed "Statute of Limitations" and "Defective Notice" among the issues contested in its notice of controversion dated May 30, 2002. EX 2. It also identified as contested issues at the formal hearing of this matter the timeliness of Claimant's notice of injury and his filing of the instant claim under Sections 12 and 13 of the LHWCA. Tr. 6. I thus find that Employer properly and timely objected to the timeliness of Claimant's claim as required by Section 13(b)(1) of the Act.

[4] My finding that Claimant's right knee condition was not in fact aggravated by his work at Electric Boat is irrelevant to the issue of when Claimant was obligated to notify his employer of, and file a claim for, what he believed to be a work-related injury. Sections 12 and 13 of the act clearly place the burden on the *employee* to take action once he "is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury . . . and the employment." As explained below, Claimant actually believed for several years that his knee condition was aggravated by his work-related activities, and he was therefore obligated to give notice and file a claim within the periods prescribed by the Act long before he actually did so.

to Section 12 notice of injury, found claimant's prior application for non-occupational sickness benefits sufficient to rebut the presumption).[5] Thus, if Section 20(b) is found applicable under the circumstances presented here, Claimant's notice of injury and claim for compensation are presumed to be timely.

Neither the Board nor the courts have addressed the issue of what, if any, evidence must be introduced by a claimant before he is entitled to the Section 20(b) presumption. However, it is well settled that it is the claimant's burden initially to establish a claim under the LHWCA. *See Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 280 (1990); *Cairns v. Matson Terminals*, 21 BRBS 252 (1988). *See also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994). He must come forward with some credible evidence that he sustained an injury arising out of and in the course of his employment with his employer before the presumption applies.[6] This burden is minimal and may be satisfied with nothing more than the claimant's own credible testimony that he suffered some harm or pain while working for his employer.[7]

There is no reason to believe that a claimant's burden with respect to the Section 20(b) presumption is any less than it would be under Section 20(a). Thus, Claimant must at least allege, through his own credible testimony or otherwise, that he gave notice and filed a claim within the requisite periods prescribed by Sections 12 and 13 of the Act regarding his right knee injury once he became aware, or by the exercise of reasonable diligence should have been aware, of a relationship between his injury and his employment at Electric Boat. Claimant's own credible testimony, however, establishes that he reasonably believed his work activities aggravated his right knee condition several years before he filed his claim for compensation. CX 1. His claim for compensation is therefore untimely.

As noted above, Claimant's testimony during the formal hearing was entirely credible with respect to his belief that his right knee symptoms resulted from his work activities while employed by Electric Boat. Although he did not identify a specific date when he first associated his knee problems with his work at Electric Boat, Claimant unequivocally testified that his right knee condition continually caused him problems at work after he returned to Connecticut from San Diego following his 1968 injury and surgery. CX 8 at 26. He further testified that he sought treatment for this condition from Dr. Carlow and others beginning in the 1980s, which treatment included cortisone shots, arthroscopic surgery, and ultimately a total knee replacement. Claimant described a variety of physically demanding work activities in which he engaged after

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[5] The Board previously stated that the Section 20(b) presumption does not apply with regard to Section 12. *Horton v. General Dynamics Corp.*, 20 BRBS 99 (1987). However, in *Bivens v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 233 (1990), the Board noted in a footnote that, to the extent *Horton* holds Section 20(b) is inapplicable to Section 12, it has been overruled by *Shaller v. Cramp Shipbuilding & Drydock Co.*, 23 BRBS 140 (1989).

[6] The claimant is not required to introduce affirmative medical evidence that working conditions in fact caused his harm; rather, the claimant must show that working conditions existed which could have caused his harm. *See generally U.S. Industries/Federal Sheet Metal v. Director, OWCP (Riley),* 455 U.S. 608, 14 BRBS 631, 633 (1982).

[7] *See, e.g., Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968) (en banc) (Claimant has sustained "injury" where he has some harm or pain, or if "something unexpectedly goes wrong within the human frame.").

1968, and he expressly related the pain he was experiencing in his knee to the work he was performing for Electric Boat. For example, Claimant testified:

> A. Well, as I said, there would be days that you would go down the shipyard – a day like today, for instance – and have to crawl around a cold hull. You would get done at the end of the day and my knees would be aching. I'd go home and they'd, you know – they really started like a couple years before I had the knee replacements to truly, you know, interfere with my life. I mean, playing golf and things like that. You know, it was a gradual think. You know, Carlow told me that would probably happened, that I would lose the cartilage eventually.
>
> Q. So, in your own estimation, this continued work aboard the submarines has something to do with, in your own estimation again, towards the ultimate need for that total right knee replacement?
>
> A. Yes. I mean, that's really the only physical thing that I did that could affect my knees. Just walking up and down the hill at Electric Boat to get down to the shipyard and back up to the hill is a – it's a heck of a walk. And that in itself – you know, there's days you come out of that place limping because you have to spend three or four hours on the boat and going back and forth to the hill. And maybe you had to do that a couple times a day. And to me it was the only thing that caused the aggravation, because I really wasn't doing any other physical thing.

CX 8 at 27-28.

It is undisputed that Claimant did not at any time prior to his retirement in November 2001 provide Electric Boat with notice, written or otherwise, that his right knee condition was aggravated as a result of his "systematic, ongoing and regular work in the shipyard including . . . work aboard the submarines . . . [involving] squatting, crawling, climbing, etc. . . . ." Cl. Br. at 18. Indeed, the first notice of injury given by Claimant with respect to his knee condition was in May 2002, approximately six months after his retirement from Electric Boat in November 2001, when he filed his claim for compensation. *See* CX 1, RX 1.[8] It was incumbent upon Claimant to notify Employer within thirty days, and file a claim for compensation within one year, of when he first came to believe, or reasonably should have believed, that his work activities were aggravating his knee condition. Claimant clearly believed his right knee condition was aggravated by his work activities several years before he filed his May 2002 claim for compensation, and he has thus failed to present any credible evidence sufficient to invoke the Section 20(b) presumption. I therefore find that Claimant has failed to give timely notice of his

[8] There is no Form LS-201, Notice of Employee's Injury or Death, of record in this case. On May 23, 2002, however, Claimant's attorney wrote to Ms. Claire White, of the U.S. Dept. of Labor's Office of Workers' Compensation Programs in Boston, MA and enclosed a Form LS-203, Employee's Claim for Compensation alleging a date of injury of "p.t. May 9, 2002." CX 1 at 2. Employer thereafter completed a Form LS-202, Employer's First Report of Injury noting Claimant's date of retirement on 11/12/01 and listing a date of injury as "5/9/2002 (Prior to)." EX 1.

injury or to timely file a claim for compensation under Sections 12 and 13 of the Act, respectively.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that the claim of Paul Garry for temporary total disability benefits subsequent to his total replacement of the right knee on July 30, 2001 is DENIED.

A

STEPHEN L. PURCELL
Administrative Law Judge

Washington, D.C.